UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOUTHERN BAKERIES, LLC

and

CHERYL MULDREW, an Individual

and

LORRAINE MARKS BRIGGS, an Individual

and

BAKERY, CONFECTIONARY, TOBACCO WORKERS, AND GRAIN MILLERS UNION

Cases 15-CA-169007
15-CA-170425
15-CA-174022

COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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This reply brief is being filed in support of the Cross-Exceptions of Counsel for the Acting General Counsel to the May 11, 2017 Decision and Order of Administrative Law Judge (ALJ) Arthur J. Amchan (JD-33-17).

I. The Judge erred in dismissing complaint paragraph 8(b) based on the his mistaken conclusion that Gloria Lollis' trial testimony in support of this allegation was inconsistent with her prior affidavit testimony (ALJD 9:1-2). [1]

Respondent, in its answering brief, is unable to point to any specific inconsistency in Lollis' testimony that justified discrediting her (Answering Brief at 1-2). Lollis' testimony fully supports paragraph 8(b) of the complaint, which alleged that Human Resources (HR) Manager Eric McNiel "told employees that company investigations were confidential and not to discuss investigations with other employees" (GCX 1[w] at page 5).[2] Despite this, Judge Amchan dismissed this complaint allegation "due to the inconsistency between Gloria Lollis' trial testimony and the affidavit she gave to the Board prior to the hearing" (ALJD 9:1-2). Nowhere in the Judge's decision does he describe or summarize Lollis' testimony, nor does he provide any specifics as to how her hearing testimony diverged from her Board affidavit – the sole reason given for discrediting Lollis.

Lollis testified at the hearing that she was summoned to a private meeting with McNiel and HR Assistant Annette Capetillo about January 22, 2016[3] where Lollis was questioned about statements coworker Cheryl Muldrew allegedly made to her while they were both working on the same production line several days before (Tr. 75-76; RX 1 at

[1] References to "ALJD" are to the pages and lines of the decision of the Administrative Law Judge (ALJ) as follows: ALJD page(s):line(s).

[2] "GCX" and "RX" references are to the numbered exhibits of the General Counsel, or Respondent, respectively. "JX" references are to the numbered Joint Exhibits. Transcript references will be denoted by "Tr." followed by the page number(s).

[3] Hereafter all dates are in 2016, unless otherwise specified.

B-21).[4] Lollis repeatedly and consistently testified on both direct examination and cross-examination that during the meeting McNiel instructed her to keep what was said in the office confidential and that it should not go back on the floor (Tr. 77, 78, 81, 82-83). McNeil did not specifically deny instructing Lollis to keep the meeting confidential. Capetillo, the only other person present in this meeting, was not called to testify by Respondent.

On cross-examination, Respondent's counsel reviewed several passages of Lollis' Board affidavit with her, but not for the purpose of impeaching her testimony on direct examination. Respondent questioned Lollis about several statements in her affidavit - which were not related to her testimony supporting complaint paragraph 8(b) - which Lollis acknowledged were correct. Significantly, these statements *were not inconsistent* with her testimony on direct examination concerning the instructions McNiel gave her in the meeting (Tr. 79-89). Respondent's questions during cross-examination relating to her Board affidavit focused on eliciting from Lollis testimony about specific statements McNiel allegedly made to Muldrew (such as instructions not to discuss an employee's own discipline with others). Lollis denied that such statements were made to her, as reflected in her Board affidavit (Tr. 79-81).

Respondent argues that McNiel only told Lollis that he (as HR Manager) will keep the information discussed in the meeting confidential (Answering Brief at 2). Respondent claims that the testimony of Lorraine Briggs and Sandra Phillips corroborates McNiel's account of what he normally says in such meetings. However, neither of these witnesses testified that McNiel provided any assurance about confidentiality on the part

[4] The page numbers for RX 1 appear in the upper right corner of each page, appearing as "B-__."

of the Company. The testimony of Briggs and Phillips reflects only that they did not recall McNiel stating that they were prohibited from discussing their own discipline with other employees (Tr. 106, 190). Consistent with Briggs and Phillips, Lollis also testified that McNiel did not make this statement to her. Respondent attempts to conflate Lollis' testimony acknowledging that she was never told that she could not discuss her own discipline with others, with her testimony that in a meeting about her coworker, Cheryl Muldrew, McNiel instructed her to keep what was said in the office confidential and that it should not go back on the floor.

Inasmuch as Respondent does not dispute that Lollis testified at the hearing (and in her earlier affidavit) that McNiel told her "whatever is said in this office is confidential," the record evidence clearly establishes that McNiel instructed Lollis not to discuss the investigation with others without a substantial and legitimate justification of the need for confidentiality (Tr. 77). Accordingly, McNiel's statement to Lollis violates Section 8(a)(1). *See Banner Estrella Medical Center*, 362 NLRB No. 137 (2015); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 873-74 (2011).

II. The Judge erred in finding Respondent's rule banning possession or use of cameras or video recording devices inside its facility without authorization and a management escort to be lawful (ALJD 9:11-25;12:5-13).

The Board has consistently held that rules broadly prohibiting the use of employees' personal cameras and recording devices in the workplace on employees' own time and in nonwork areas unlawfully chill protected concerted activity. *Whole Foods Market, Inc., 363 NLRB No. 87 (2015); Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (2015); *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 4-6 (2016). Here, employees would reasonably read Respondent's rule to prohibit all possession or

use of a camera or video recorder by employees, including attempts to document health and safety violations or other protected concerted activity. The rule provides no context that would indicate otherwise. This rule is also unlawful because it requires employees to secure permission from management before bringing the device into the facility and *requires a management escort* while taking pictures or videos.[5] Additionally, this provision clearly restricts employees from bringing cell phone cameras or conventional cameras anywhere inside Respondent's facility. These rules are unlawfully overbroad because employees would reasonably construe this rule to preclude them from using a cell phone to engage in Section 7 related communications from the time they came on duty or began their shift, including during breaks or meal periods.[6] Employees also would reasonably read this rule as precluding them from documenting and sharing information regarding working conditions through pictures and videos, such as employees working without proper safety equipment or in hazardous conditions.

In finding this rule lawful, the Judge stated that he found Respondent's business justification "more similar to *Flagstaff Medical Center* than other relevant Board cases" dealing with rules pertaining to photography (ALJD 12:5-6). *Flagstaff Medical Center*, 357 NLRB 659 (2011), however, concerned a healthcare facility where unique and substantial issues pertaining to patient privacy interests are implicated. The same cannot

[5] *See Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001) (finding rule requiring authorization to distribute literature on employee's own time in non-work areas unlawful); *Brunswick Corp.*, 282 NLRB 794, 794–95 (1987) (finding rule requiring permission to engage in solicitation during non-work times in non-work areas unlawful).

[6] *Central Security Services*, 315 NLRB 239, 243 (1994) (employer violated § 8(a)(1) by maintaining an overbroad rule that stated, "[o]nce on duty, the carrying and reading of any type of literature is strictly forbidden."); *see also Aluminum Casting & Engineering Co.*, 328 NLRB 8, 9 (1999) (finding unlawfully overbroad rule prohibiting production and maintenance employees from "[s]oliciting or selling on company premises except when all concerned are relieved from duty"), *enforced in relevant part*, 230 F.3d 286, 293 (7th Cir. 2000) ("Such a rule would prohibit protected activities even during breaks and lunches, and would be presumptively unlawful.").

be said of Respondent's commercial bakery. The Board has rejected other attempts to extend *Flagstaff* beyond the healthcare setting to other commercial operations. *Whole Foods*, slip op. at 4. Moreover, the rule at issue in *Flagstaff* was not an outright ban on all photography inside its facility, as Respondent's rule is. Thus, the Judge's reliance on *Flagstaff* is clearly misplaced.

Respondent's justification for its broad restrictions on the possession or use of any cameras or video recording devices anywhere inside its facility cannot withstand scrutiny. In defending the facility-wide ban, Respondent relies solely on a vague, unsubstantiated assertion by General Manager Rickey Ledbetter that products Respondent produces for customers may be found in areas of the facility other than the production floor (Answering Brief at 5). It is submitted that this uncorroborated claim, standing alone, is insufficient to justify Respondent's ban in all non-production areas of the facility, such as the administrative and human resource office areas. Thus, the scope of this rule goes well beyond Respondent's legitimate interest in protecting its proprietary information and processes. *See T-Mobile*, 363 NLRB slip op. at 4-5.

III. The Judge erred in finding Respondent's rule banning the use of all cameras and audio or video recording devices anywhere on Respondent's premises, in a company-supplied vehicle, or off premises while on company business, to be unlawful only insofar as it prohibited audio recordings in non-production areas of Respondent's facility (ALJD 10:5-8; 12:5-19; 12:40-41).

Respondent's employee handbook contains the following rule:

> Unauthorized use of still or video cameras, tape recorders, or any other audio or video recording devices on Company premises, in a Company supplied vehicle, or off-Company premises involving any current or former Company employee, without such person's expressed permission while on Company business. (JX 2 at 18, Rule 12).

The Judge determined that this rule was overbroad only to the extent that it prohibited audio recordings in non-production areas of Respondent's facility (ALJD 12:15-19). It is submitted that the Judge erred in failing to go further and to find this rule to be unlawfully overbroad in other respects as well.[7] The Judge neglected to address this rule's clear application to exterior areas of Respondent's premises -- and to company-supplied vehicles and to individuals "while on Company business."

Respondent argues that that this rule is lawful because it imposes restrictions on recordings that are outside of Respondent's control because the rule provides that current or former employee(s) being recorded must consent to the recording (Answering Brief at 9). This specious argument must be rejected. Where, as here, an employer conditions the exercise of Section 7 rights upon obtaining a coworker's assent or permission, such restrictions are unlawful.[8]

In light of the foregoing, it is submitted that the Judge clearly erred in failing to address the lawfulness of this rule as it applies to areas other than the interior of Respondent's facility.

IV. The Judge erred in finding the following rule to be lawful: "Any conduct, which could interfere with or damage the business or reputation of the Company or otherwise violate accepted standards of

[7] The Acting General Counsel contends that this rule constitutes an unlawfully overbroad prohibition on photography and audio/video recording inside Respondent's facility for the same reasons set forth in the argument in support of cross-exception 2, *supra*.

[8] *Cf*., *Labinal, Inc*., 340 NLRB 203, 209-10 (2003) (finding employer violated 8(a)(1) by maintaining rule that prohibited employees from discussing coworker's pay without latter's knowledge or permission; "By requiring that one employee get the permission of another employee to discuss the latter's wages, would, as a practical matter, deny the former the use of information innocently obtained, which is the very information he or she needs to discuss the wages with fellow workers before taking the matter to management."); *White Oak Manor*, 353 NLRB 795, 795 n.2 (2009) (employee's use of cell phone to take unauthorized pictures of coworkers to document disparate enforcement of dress code policy to induce group action to compel employer to fairly enforce policy "was part of the res gestae" of protected concerted activity), adopted and affirmed 355 NLRB 1280 (2010), enfd. 452 Fed. Appx. 374, 380 (4th Cir. 2011) (unpublished decision).

behavior, will result in appropriate discipline up to and including immediate discharge" (ALJD 9:35-38; 10:38-11:2).

Despite the fact that Respondent failed to present any evidence justifying the maintenance of this rule, the Judge determined this rule to be lawful without providing any explanation or rationale for his conclusion (ALJD 9:35-38, 10:38-11:02).

Respondent argues that this rule is most closely analogous to the rules found lawful in *Ark Las Vegas Restaurant Corp.* (335 NLRB 1284 [2001]) and *Lafayette Park Hotel* (326 NLRB 824 [1998]). This contention is misplaced and must be rejected. The rules at issue in those cases contemplated employee conduct that was intrinsically improper and unprotected. This rule, by contrast, is not similarly focused on inherently improper actions, but is reasonably read to include protected behavior that Respondent subjectively views as negatively impacting its business or reputation, or inconsistent with "accepted standards of behavior." Thus, the case authorities cited by Counsel for the Acting General Counsel in support of this cross-exception are applicable here. *See, e.g.*, *First Transit, Inc.*, 360 NLRB 619, 619 n.5, 630 (2014).

V. The Judge erred in finding Respondent's rule prohibiting "any off-duty conduct which could impact or call into question the employee's ability to perform his or her job" to be lawful (ALJD 10:1-2; 10:38-11:2).

Respondent argues that this rule was correctly determined to be lawful because this rule is "narrowly focused on outside activities that affect an employee's 'ability' to perform his or her job" and no employee would reasonably read this rule as encompassing Section 7 activities (Answering Brief at 13).

Section 7 of the Act protects employees' right to engage in concerted activities (such as advocating for or initiating strike activities) to improve their terms and

conditions of employment, even if that activity is in conflict with the employer's interests. Where a rule is reasonably read to prohibit such activities, it will be found unlawful. Here, Respondent's rule is so broad and amorphous that an employee would reasonably interpret it to include any perceived disloyal conduct, such as concerted strike or picketing activity[9] or public criticism of Respondent's labor policies, because such activities "could impact or call into question" an employee's ability to perform the job.

VI. The Judge erred in finding Respondent's rule prohibiting unauthorized entry into the facility by employees to be lawful (ALJD 11:footnote 11).

Respondent's contends that this rule is justified by its legitimate interest in maintaining control of who enters the facility in order to protect product safety and the safety of on-duty employees. (Tr. 296-97, 306-08). Respondent further argues that the impact of this rule is limited solely to "unauthorized employees" (Answering Brief at 15).

Respondent, however, failed to present any evidence as to the circumstances in which off-duty employees are authorized to enter the facility and when such permission is denied.[10] As the Board stated in *Casino San Pablo*, allowing access only with management's approval "effectively vests management with unlimited discretion to expand or deny off-duty employees' access for any reason it chooses." *Casino San Pablo*, 361 NLRB No. 148, slip op. at 6 (2014); *Saint John's Health Center*, 357 NLRB 2078, 2080-83 (2011) (finding rule denying off-duty employees access to interior of facility unlawful where it was not a blanket prohibition but "permitted access to the building to

[9] It is obvious that employees engaged in strike activities come within the express provisions of this rule as such activity renders the striking employee unable to perform his or her job, at least for the duration of the strike.

[10] See *Piedmont Gardens*, 360 NLRB 813, 814 (2014) (finding employer's no-access rule for off-duty employees unlawful despite employer's claim it permitted access only in three limited circumstances because evidence did not establish these were only circumstances under which employer had granted interior access).

attend [employer-] sponsored events, such as retirement parties and baby showers"; Board majority concluded rule told employees "you may not enter the premises after your shift except when we say you can").

Applying these principles here, the Judge erred in finding that Respondent's maintenance of its no-access rule was lawful when the rule fails to satisfy the third element of the *Tri-County* test since there is no blanket prohibition of such access for off-duty employees for *any purpose*.[11] Thus, the Board should grant this exception and hold that Respondent's maintenance of its no-access rule violates Section 8(a)(1).

VII. The Judge failed to address General Counsel's request for consequential damages and failed to provide for such a remedy in his decision (ALJD 13:11-24).

Respondent erroneously asserts that there is longstanding, well-established precedent against the award of consequential damages which should not be disturbed, citing *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). The *Local 513* case, however, involved very unique facts in which the Board declined to award backpay to individuals who were unable to work following a physical assault by union agents. The Board's rationale for denying monetary make whole relief was that state remedies for the illegal tortious conduct were readily available. The Board, moreover, explicitly acknowledged that its decision to deny this remedy did not reflect a determination of its statutory authority to award such relief, but instead reflected the Board's belief that ordering backpay in the circumstances presented would not effectuate the policies of the Act. *Id*. at 555.

[11] See e.g., *Sodexo America*, LLC, 358 NLRB 668, 669 (2012) (off-duty access policy "violates Section 8(a)(1) because it does not uniformly prohibit access to off-duty employees seeking entry to the property for any purpose"), citing *Saint John's Health Center*, supra. *Sodexo America* was issued by a panel that under *Noel Canning* was not properly constituted. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). The Board should adopt the sound reasoning and rationale of the *Sodexo America* decision as its own.

Reimbursement for consequential economic harm is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g., Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). A ruling allowing for consequential damages would accomplish this objective.

CONCLUSION

For the reasons discussed above, the Acting General Counsel requests that the Board grant each and every cross-exception and find that Respondent committed additional violations of Section 8(a)(1) as set forth herein.

Dated at Memphis, Tennessee, this 14th day of November, 2017.

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2017, a copy of Counsel for the Acting General Counsel's Reply Brief in Support of Cross-Exceptions was filed via E-Filing with the NLRB Office of Executive Secretary.

I further certify that on November 14, 2017, a copy of Counsel for the Acting General Counsel's Reply Brief was served by e-mail on the following:

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